IN THE

Supreme Court of the United States

OCTOBER TERM—1946

No. 423

W. E. HEDGER TRANSPORTATION CORPORATION,
Petitioner,

against

IRA S. BUSHEY & SONS, INC.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER E. HECKMAN,
Counsel for Respondent.

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Respondent respectfully submits that the petition for writ of certiorari should be denied.

The judgment of the District Court finally disposed of the action because it dismissed petitioner's complaint (R. 50). But the reversal of the judgment (R. 55) leaves considerable doubt whether it is now final.

The Circuit Court of Appeals directed that petitioner's complaint be treated as a petition to vacate a decree in a previous mortgage foreclosure action between the parties (R. 55). It dismissed only a small part comprising petitioner's demand to recover damages on a cause of action for abuse of process, there being no diversity of citizenship and such cause of action being entirely separate and distinct from that which formed the basis of jurisdiction, viz.: the application to vacate the Admiralty decree in the mortgage foreclosure proceeding.

This Court has before it only the allegations of the complaint. There is no final judgment on the merits.

The petition fails to show any conflict between the decisions of the different Circuits or of this Court. There is no important question of Federal or local law involved. By holding that an application to vacate a judgment must be considered an integral part of the proceeding in which the judgment was rendered, the decision has followed the usual course of judicial proceeding. No substantial questions of importance are shown to be involved.

Petitioner's recitation of the facts alleged (but not yet proven) is so incomplete that respondent deems a more lengthy one necessary in the interests of clarity.

Facts

On February 10th, 1945, respondent instituted an action in Admiralty in the United States District Court, Eastern District of New York, under Title 46, U. S. C. A. Section 951, *in rem* against 35 wooden barges and *in personam* against petitioner for the foreclosure of a United States preferred maritime mortgage on the vessels.

Under process duly issued, the vessels were seized by the Marshal. Petitioner filed an answer pleading payment as well as lack of adequate consideration for the mortgage, and demanding an accounting of the monies paid to respondent (Complaint, 32nd Allegation, R. 13). The Court ordered a prompt trial, which was begun on March 7th, 1945 (44th Allegation, R. 17).

Despite the opportunity then open to obtain a prompt decision on the merits of its asserted defense of payment, petitioner in open court, after the trial had begun, formally tendered to respondent the amount demanded and consented to the entry of a final decree in favor of respondent in the mortgage foreclosure proceeding (Complaint 22-23). On March 8th, 1944 petitioner obtained

satisfactions of the decree and of the preferred mortgage in exchange for its payment to respondent (R. 23). Thus respondent's lien on the vessels was discharged.

On April 4th, 1945, twenty-seven (27) days after the entry of the decree and delivery of mortgage satisfactions petitioner instituted this action in Equity in the United States District Court, Eastern District of New York (joining its president as an individual party plaintiff). This was before expiration of the term of Court in which the final decree had been entered and long before the expiration of the time for appeal therefrom.

Petitioner demanded (a) that the consent decree be vacated; (b) an accounting; (c) discovery of respondent's books and records; (d) cancellation or reformation of the mortgage instrument; (e) an injunction restraining respondent from disposing of the sum paid in satisfaction of the consent final decree and mortgage; (f) damages in the sum of $109,288.06 (R. 25-26).

The damages demanded comprised the amount paid in satisfaction of the decree and mortgage (64th allegation, R. 23), $30,000 damaged suffered as a result of the retention of the vessels under process which was alleged to constitute an abuse of process (R. 24) and $9,800 paid by petitioner to respondent on account of the mortgage indebtedness previous to the institution of the foreclosure suit, allegedly under a mutual mistake of fact as to the amount due (R. 24-25).

Petitioner and respondent are New York corporations (R. 3); the individual plaintiff a resident of New Jersey (R. 3).

Respondent moved before answer for judgment dismissing the complaint on the grounds of non-jurisdiction of the Equity side of the Federal Court over the subject matter and failure to state a claim on which relief could be granted (Notice R. 32).

Under *City of Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 69; 62 S. Ct. 15, 17; 86 L. Ed. 48, jurisdiction could not have been sustained on the ground of diversity of citizenship and petitioner did not so urge. The District Court dismissed for lack of jurisdiction of the Equity side of the Court without prejudice to petitioner's right to file in Admiralty a libel for review of the mortgage foreclosure proceedings on the ground alleged in the complaint (Opinion, R. 36-37). On appeal petitioner argued that the Equity side has jurisdiction to set aside a decree entered in a United States Court even though in Admiralty without any other jurisdictional requirement and argued that the Admiralty side of the Court was without jurisdiction to grant the relief sought by the complaint.

The Circuit Court of Appeals, pointing out that matters of form should be disregarded to reach the substance, held that instead of dismissing the complaint the District Court should have treated it as a libel of review or a petition in the foreclosure suit to vacate the decree (R. 55 and 51); that under such petition the Admiralty Court if pursuaded that the decree should be vacated has jurisdiction to grant all the relief plaintiff requested except its demand for damages for the abuse of process averred in the 67th allegation (R. 51-53). The Court pointed out that recovery for abuse of process would be a separate cause of action not connected with the subject matter of the foreclosure suit as to which plaintiff must proceed in the State Court because it would not constitute a maritime tort within the Admiralty jurisdiction and diversity of citizenship was lacking (R. 53). Thereafter, petitioner applied for reargument contending that the abuse of process cause of action should not have been dismissed inasmuch as there was Admiralty jurisdiction because the alleged wrongful attachment of the vessels under the abuse of process occurred on maritime waters, thus constituting a maritime tort (R. 59). Denying this petition the Circuit Court pointed out that such contention had not been raised on the argument,

but that petitioner would be granted leave to file on independent libel in the District Court for the alleged maritime tort, leaving the District Court free to decide the jurisdictional question and if satisfied as to it "free to exercise its discretion to hear the evidence in that suit at the same time as the evidence in the foreclosure suit (R. 65-66).

Under these rulings petitioner has an opportunity to have a single trial in one Court of all the issues of its complaint and if it satisfies the Court that the Admiralty foreclosure decree was wrongfully obtained to produce evidence supporting its demand for an accounting.

It appears that if petitioner had proceeded in the manner suggested in the Circuit Court's decisions, the last of which was rendered May 23rd, 1946, petitioner by this time might well have obtained a final decision on all issues tendered. Certainly it would be well on the way toward termination of the litigation.

POINT I

The decision is correct.

When Congress gave the Admiralty Court exclusive jurisdiction of *in rem* proceedings to foreclose a preferred maritime mortgage (46 U. S. C. A. 951) it certainly did not intend that after appropriate proceedings in such Court a mortgagee should be subjected to another trial of the same issue in a different Court in an action for review of the Admiralty proceedings. Of course, the Admiralty Court which granted the decree has jurisdiction to review its own proceedings and to open its own decree, but if petitioner be entitled to proceed in Equity in the Eastern District of New York as it seeks to do here, it may proceed on the Equity side of a District Court of some other State, provided only venue jurisdiction can be had there.

Such step would be contrary to the well settled rule of *Carey* v. *Houston & Texas Central RR. Co.*, 161 U. S. 115, at 130, that an action for the review or correction of a decree or judgment is a "continuation of the main suit."

In *Carey* v. *Houston, supra,* this Court said (132):

> "We regard it as not open to argument that the jurisdiction of the circuit court, as a court of the United States, over this suit, rested on the jurisdiction of that court over the suit in which the decree of May 4th, 1888, was rendered * * *."

The Equity side of the United States District Court for the Eastern District of New York had no jurisdiction over the suit in which the decree of March 8th, 1945, was rendered, because that was a decree in an *in rem* proceeding in Admiralty to foreclose a preferred mortgage. Therefore, it has no jurisdiction over this suit to vacate that decree.

Petitioner suggests that the Admiralty Court's jurisdiction ended when the decree of foreclosure was entered and satisfied. This contravenes the basic principle that within certain time limitations not here involved a Court has general power to vacate, change or modify its own decree improperly obtained.

If we assume petitioner's success in proving its assertion that this decree was obtained by improper means (which imputes misconduct to three District Judges) (Cf. 37th, 39th, 43rd and 44th allegations, R. 15 and 17) the foreclosure decree should be vacated, but there would still remain for trial and disposition the original suit *in rem* to foreclose the mortgage. If petitioner offered enough evidence to warrant an accounting there can be no doubt about the Court's power to require one when necessary to render final judgment in an action over which jurisdiction was expressly conferred by statute.

As the Circuit Court of Appeals stated in its opinion (R. 52):

> "Clearly a Court of Admiralty at times must state accounts as an incident to the disposition of suits within its cognizance; general average is one instance, salvage is another. In the case at bar the foreclosure suit was brought under Section 951 of Title 46 U. S. C. and it would be impossible to enforce the statute, if the suit must be halted every time a question of accounting arose as to the amount due upon the mortgage."

Petitioner states the case as though its resort to Equity to vacate an Admiralty decree of foreclosure in an *in rem* proceeding involving a preferred maritime mortgage was proper and as though its case involved only incidental Admiralty matters. It also says (in its brief, pp. 9 and 10) that an accounting must first be had to ascertain whether petitioner owed respondent any money and that to open the Admiralty decree first "just to have an equitable accounting in an Admiralty Court seems to be putting the cart before the horse." It is petitioner who confuses the cart's location. Until petitioner succeeds in proving that the decree in the Admiralty proceeding was improperly obtained, it stands as an adjudication that there was a balance in favor of respondent. The existence of such decree, the attempt to vacate it and the necessity for vacating it are the very grounds which petitioner must urge as the base of jurisdiction in this action between two corporations of the same state. Certainly a Federal Court has no jurisdiction in a suit for a simple accounting between two citizens of the same State.

POINT II

The dismissal of the cause of action for abuse of process was proper.

In *Hurn* v. *Oursler,* 289 U. S. 238, the Court clearly stated that if one cause of action be separate and distinct from another in the sense that it is based upon entirely different facts and is outside the Federal jurisdiction, it must be dismissed even though the other cause be within the jurisdiction. Petitioner does not contend that the causes of action are the same.

That petitioner's claim for damage for abuse of process may be cognizable in Admiralty (which we do not concede) where jurisdiction depends on the maritime character of the transaction does not mean it is cognizable on the Law or Equity side where diversity or a Federal question is a prerequisite to jurisdiction.

CONCLUSION

The petition should be denied.

Respectfully submitted,

CHRISTOPHER E. HECKMAN,
Counsel for Respondent.